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PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 182

BERNARD WILSON,

Petitioner,

vs.

DONALD F. SCHNETTLER, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S BRIEF

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PETITIONER'S BRIEF

Opinion Below

Wilson v. Schnettler, 275 F.2d 932.

Jurisdiction

The judgment of the U.S. Ct. of Appeals, 7th Circuit, was entered on March 21, 1960. Jurisdiction of this Court was invoked under Title 28 U.S.C. Sec. 1254 (1) in a Petition for Certiorari filed April 9, 1960. Certiorari was granted June 27, 1960. The printed Transcript of Record was received by counsel for the appellant on August 18, 1960.

Questions Presented

1. Whether federal officers who illegally obtain evidence from a person should be restrained by the United States District Court from testifying solely with such evidence in a State criminal proceeding?

2. Where real tangible evidence is illegally obtained by federal officers should the United States District Court withhold such evidence from the State?

3. Where federal officers illegally obtain evidence from a person may such federal officers oust the District Court of its supervisory powers over federal law enforcement agencies by bringing a criminal charge against the person in a State court?

Statutes Involved

Rule 41 (e) (1), Federal Rules of Criminal Procedure:

> "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized * * * to suppress for use as evidence anything so obtained on the ground (1) the property was illegally seized without warrant * * *"

Statement

On April 14, 1959 at about 7:30 A.M. the respondents arrested the petitioner and searched him without a warrant; they recovered a certain amount of narcotic drugs from his person.

Petitioner was not taken before a United States Commissioner but was lodged in the Cook County Jail.

Thereafter, petitioner was indicted by the Grand Jury of Cook County, Illinois, and charged with the crime of Unlawful Possession of Narcotic Drugs.

Petitioner was arraigned, entered a plea of not guilty, and moved to suppress the evidence.

On August 3, 1959, a hearing was held in the Criminal Court of Cook County, Illinois, at which time the respondents testified that they saw the petitioner enter a certain building under surveillance where they had information that narcotics were being sold. A short time later the federal agents observed him leaving the building. They then arrested and searched him without a warrant. The agents could not state under oath whether or not petitioner had narcotic drugs in his possession before he entered the building under surveillance.

The motion to suppress was denied, and in determining the question of illegal search and seizure the Federal Rules of Criminal Procedure were not applied.

Thereafter, petitioner commenced the proceedings in the District Court in question here. He alleged that jurisdiction of the District Court was based upon the supervisory powers of Federal Courts over federal law enforcement agencies. Through the procedural device of declaratory judgment, petitioner asked the District Court to hold a hearing and determine whether the respondent federal narcotic agents acted in conformity with the strict standards imposed upon them by the Federal Rules of Criminal Procedure when they arrested and searched the petitioner without a warrant. In the event that the District Court found the search and seizure in violation of the federal rules, petitioner requested it to impound the seized narcotics and to perpetually enjoin respondents from testifying in respect thereto in the pending criminal proceeding in the Criminal Court of Cook County, Illinois.

The District Court dismissed and the Court of Appeals affirmed.

Summary of Argument

1. Where federal agents arrest a citizen without a warrant and seize real tangible evidence from him, the citizen should be entitled, in a proper case, to a hearing by the United States District Court in order to determine whether the federal agents acted in conformity with the strict standards imposed upon them by the federal rules governing searches and seizures.

2. Federal agents should not be permitted to oust the District Court of its power of policing the requirements of the federal rules by the simple expedient of proceeding in the State court.

ARGUMENT

The appellant urges that this case be reversed on the rationale of *Rea* v. *United States*, 350 U.S. 214.

In the case at bar the Court of Appeals held:

> "Unless these (federal) officers act under color of judicial authority or order of the federal courts, they are not subject to the federal supervisory power, and the sanctions wielded by this power cannot intrude to restrain their testimony in a State criminal trial" (R. 15).

We are unable to find any such condition in the *Rea* case. In *Rea*, this Court held: "The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforce-

ment. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings." 350 U.S. 214, 217, 218.

In the case at bar the Court of Appeals held:

> "This case squarely raises the question asked by the dissenting minority in *Rea*: 'Would the Court's decision have been different had there been no search warrant at all?' 350 U.S. 214, at 219" (R. 14).

Lifted from context this question might readily mislead a lower court, but, as it appears in context in the *Rea* dissent, the question was used as a conclusion to the dissenting minority's objection that the *Rea* case could not be brought within the *McNabb* doctrine.[1] (*McNabb* v. *United States*, 318 U.S. 332.)

It appears to us that the dissenting minority in *Rea* supplied three major premises from which they argued that the action taken by the majority was improper; that since *Rea* did not fit within any of the three supplied premises, it didn't fit anywhere. This dissent was answered by the majority opinion in *Rea*, and nowhere therein do we find the *United States Commissioner* in violation of the federal rules governing searches and seizures, but we do find the *federal agent* in violation of such rules. Therefore, we conclude that the evil condemned in *Rea* was the invasion of the privacy of the citizen in violation of the federal rules by the *federal agent*.

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[1] With the utmost respect for the dissent, we hasten to submit that *McNabb* was cited by the majority in *Rea* only by way of comparison. (350 U. S. 214, 217: "Cf. *McNabb* . . . .")

We are not alone in this conclusion. In the case of *Ramirez* v. *Lozoya*, 253 F.2d 85, at page 89, the Court of Appeals for the Ninth Circuit held:

> "If the Federal officer proposes to testify solely with evidence illegally obtained, then *Rea* requires he be restrained on proper application. If the real tangible evidence * * * was seized illegally *Rea* would require that it be withheld from the State.
>
> * * * It has been established by the Supreme Court that society must pay the penalty of losing its evidence, if that evidence has been obtained by the heavy hand of Federal officers."

In the instant case the respondent federal officers did not seek the protection of a warrant, but took the law into their own hands and proceeded without one. We submit that this is a more flagrant flouting of the federal rules than that condemned in *Rea*. What is the greater flouting of the federal rules governing searches and seizures, seizure under a defective search warrant, or seizure under no warrant at all? Historically and logically the answer should be: Under no warrant. To hold otherwise is to say that the law governing searches and seizures has degenerated to a point where a law enforcement officer is better off without a warrant than he is with one. If all of the historical reasons underlying rules designed to protect the privacy of the citizen have eroded to such a point, then logic has triumphed over the facts of life. This Court knows that law enforcement officers will push the rules as far as the judiciary will permit.

After reciting the facts of the instant case, the Court of Appeals said the "respondent federal narcotic agents may have acted in violation of the Fourth Amendment and of the due process clause of the Fourteenth," but the door

to the District Court remains closed to the appellant because "they did not do so under color of federal judicial authority" (R. 16).

We are unable to understand such reasoning. How could the respondent federal agents violate the Fourth Amendment and the due process clause of the Fourteenth, without at the same time violating the federal rules governing searches and seizures?

This Court has said that the power of the federal courts extends to policing the requirements of such rules and making certain that they are observed. *Rea* v. *United States*, 350 U.S. 214, 217. But the instant decision holds that the District Court is powerless to police the requirements of the federal rules because the respondent federal agents did not get a warrant. This is an invitation to the federal agent to avoid the United States Commissioner; it tells the federal agent that he is better off not to get a warrant.

We cannot bring ourselves to believe that the policy enunciated in *Rea* could be rendered impotent by such a simple expedient.

Moreover, this decision points to the fact that, "The admission of the allegedly illegally seized narcotics has not been sought in a federal court" (R. 16).

If this is a fatal distinction, then again the federal policy announced in *Rea* can be easily defeated. This permits the federal agent, who owes obedience to the federal rules, to decide *IF* those federal rules will be enforced against him. It permits the federal agent to oust the District Court of its power of policing the requirements of the federal rules by the simple expedient of proceeding in the State court. Where the federal agent has acted in conformity with the strict standards imposed upon him by the federal rules, he

can proceed to prosecute in the District Court; where he has flouted the federal rules he can select a forum that condones his action. The choice is his. We submit that such distorted result is not in keeping with the underlying philosophy of *Rea*.

Where federal agents arrest a citizen without a warrant, and then by-pass the District Court and proceed to prosecute in a State court, 99 out of 100 such cases may properly come within the purview of 28 U.S.C. 198 (a) adjuring the Secretary of the Treasury to cooperate with the several states.

However, there is nothing in that section of the judicial code which authorizes a federal agent to act in disregard of the command of the federal rules governing searches and seizures, and in such cases the District Court should be open to the citizen whose privacy has been invaded. That is the only way to a uniform enforcement of the federal policy announced in *Rea*.

The Court of Appeals in the case at bar relied on *Douglas* v. *City of Jeannette*, 319 U.S. 157 (R. 14, 18), and cited *Wolf* v. *Colorado*, 338 U.S. 25 (R. 15), and the respondents have relied also on *Ponzi* v. *Fessenden*, 258 U.S. 254, and *Stefanelli* v. *Minard*, 342 U.S. 117. We respectfully submit that none of these cases are controlling because they did not involve illegal search and seizure by *federal agents*.

In the case at bar, the immediate relief prayed for was a hearing in the District Court to determine if the respondent federal agents had flouted the federal rules.

We recognize that the *Rea* case is not on "all fours" with the instant case. In *Rea* the appellant had the benefit of a prior federal judicial determination that the federal agents had violated the federal rules. In the case at bar, the appellant *alleges* that the federal agents have flouted

the federal rules, but he doesn't *know* that they have until a federal court says so. To hold this distinction decisive is tortuous; if we deal in principles instead of semantics, there is a distinction without a difference. Here, as in *Rea*, the ultimate relief prayed for is an injunction against the federal agents who owe obedience to the federal rules.

The federal policy announced in *Rea* in January, 1956, was to keep federal agents "clean" of illegally seized evidence. Since that time, the only question among legal scholars was how that policy could be reconciled with the "silver-platter doctrine" which was recently jettisoned by this Court's decision in *Elkins* v. *United States*, 364 U.S. 206, and *Rios* v. *United States*, 364 U.S. 253.

Therefore, we respectfully conclude that this Court's philosophy as regards illegally obtained evidence is:

(1) to exclude its use in federal courts where state or federal officers are involved, and

(2) to exclude its use in federal or state courts where federal officers are involved.

Denying this appellant a hearing in the District Court is repugnant to that philosophy.

Conclusion

For the reasons stated we submit that the judgment of the court below should be reversed.

Respectfully submitted,

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